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THE CONSTITUTIONALITY OF THE SELECTIVE-DRAFT LAW.

On August 20, Judge Emory Speer of the southern district of Georgia upheld the constitutionality of the selective-draft law, on an application for writs of habeas corpus on behalf of two men who failed to register for military duty.

The decision, as published in the New York Times and reprinted in the Congressional Record, is as follows: "Arthur Jones and John Story, imprisoned in the Richmond county jail under commitment for unlawfully failing to register for military duty as required by the Act of Congress of May 18, 1917, known popularly as the selective-draft law, have made application for writs of habeas corpus. They allege that their imprisonment is unlawful. They charge that the enactment, made to raise a national army, is violative of the Constitution of the United States. It is insisted that the authority exercised by the United States under this legislation is void because the act contravenes the 13th Amendment. This provides that 'neither slavery nor involuntary servitude, except as punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.'

"To agree to this contention we must conclude that a soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill, and courage is and must be committed the task of maintaining the very existence of the nation and all that its people hold dear. The Grand Army of the Republic, the Confederate Veterans, and the Sons of Veterans, are not maintained to preserve the traditions of slavery. Nations do not pension slaves to commem-

orate their valor. They do not 'give in charge their names to the sweet lyre,' nor does—

Sculpture in her turn
Give bond in stone and ever-during brass
To guard and to immortalize the trust.

"The sole additional ground of the petition is that by the common law it was the right of petitioners to 'remain within the realm,' and that this right should now be held to relieve them from military service beyond the borders of the United States. The reply is that the common law—that is, the immemorial English law—cannot prevail as to the United States or its people against the explicit provisions of an act of Congress. Nor has a court of the United States power to declare an act of Congress invalid because it is inimical to the common law. The touchstone for such judicial power is the Constitution, and nothing else.

"It remains to be determined whether the Constitution has conferred authority on Congress to enact this law. Clause 11 of article 1, § 8, of the Constitution, empowers Congress 'to raise and support armies.' This power is plenary. It is not restricted in any manner. Congress may summon to its Army thus authorized every citizen of the United States. Since it may summon all, it may summon any. Said the Supreme Court in the *Tarble's Case*, 13 Wall. 408, 20 L. ed. 601: 'Among the powers assigned to the national government is the power to raise and support armies. * * * Its control over the subject is plenary and exclusive. It can determine without question from any state authority how the Army shall be raised, whether by voluntary enlistments or forced draft, the age at which the soldiers shall be received and the period for which they shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned.'

"It is urged that by this legislation Congress has taken over and in this way conscripted the National Guard. This, it is said, is the state Militia. It is contended under clause 14 of the article and section above quoted that such Militia can be used only to execute the laws of the Union, to suppress insurrection, and repel invasion. Since those petitioners are not members of

the National Guard, in no event could their rights in this way be affected. But the National Army is not the Militia. An army is a body of men whose business is war. *Burroughs v. Peyton*, 16 Gratt. 475. The Militia is 'a body of men composed of citizens occupied temporarily in the pursuits of civil life.' *Ibid*.

"As we have seen, Congress in the exercise of the power to raise armies may summon to the colors every citizen. It follows that the states, even if they so desire, cannot defeat this power by enlisting such citizens in the state troops or National Guard. Was this possible, it would be also possible for the states to prevent altogether the raising of armies by Congress.

"There remains to be considered the contention that Congress cannot employ the National Army to be created by virtue of this legislation in foreign lands or beyond the seas. If this is true, then, indeed, is our country impotent. Then must its people indeed suffer in their own homes, in their cities, and on their farms all the horrors of invasive war. Its military leaders must ignore the settled principle of their science, that the best defensive is the most vigorous offensive. The keen swords of its sons, instead of flashing over the guard of the enemy and piercing his vitals, must be held immovable, as if on an anvil, to be shattered by the reiterated blows of his hammer. Deprived of our aid in the field, successive defeats will visit and crush our Allies. Their lands conquered, their navies taken, we must then in turn, solitary and alone, meet on our own soil the impact of victorious and barbarous legions whose laws do not forbid their service abroad, but which inspire their fierce and veteran armies to deeds of conquest in every clime.

"Was this contention maintainable, the misguided men who for their personal ease advance it might all too late discover their fatal error. They would discover it in the flaming homesteads, in the devastated fields, in murdered brethren, in outraged wives and daughters, in their lands, their factories, their merchandise, their stock, their all, coolly appropriated by the conqueror as his own; their institutions destroyed; homeless, landless, and beggars to spend whatever interval of degraded life remains to them in abject slavery to the conqueror.

"But our organic law does not so shackle the gigantic energies of the great Republic. After the enumeration of the powers of Congress, among them, as we have seen, 'the power to raise and support armies.' In clause 17 of article 1, § 8, it provides the power to 'make all laws which shall be necessary and proper for carrying into execution, the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Here is the greatest reservoir of power to save the national existence.

"It is said that there is no express power to send armies beyond the sea. True; but there is no express power to enact the criminal laws of the United States, none to convey the public domain, to build a transcontinental railroad, nor to construct the Isthmian canal, nor to create the Interstate Commerce Commission, nor to declare the Monroe Doctrine, nor to make the Louisiana Purchase, nor to buy Alaska, or to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective army will be created under the law here assailed, 'to provide for the common defense,' and beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the scourge of God, The writs are denied."